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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

MONSTER ENERGY COMPANY, a  
Delaware corporation,

Plaintiff,

vs.

VITAL PHARMACEUTICALS, INC.,  
d/b/a VPX Sports, a Florida corporation; and  
JOHN H. OWOC a.k.a. JACK OWOC, an  
individual

Defendants.

CASE NO. 5:18-cv-01882-JGB-SHK

**DEFENDANT VITAL  
PHARMACEUTICAL, INC.'S  
REPLY BRIEF IN SUPPORT OF  
OBJECTIONS AND NOTICE OF  
MOTION AND MOTION FOR  
RECONSIDERATION OF  
MAGISTRATE JUDGE ORDER  
RE MOTIONS TO COMPEL  
(ECF NO. 136)**

District Judge:  
Hon. Jesus G. Bernal

Magistrate Judge:  
Hon. Shashi H. Kewalramani

Date: December 9, 2019, 9:00 a.m.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant Vital Pharmaceuticals, Inc. (“VPX”) files this Reply brief in response to the Opposition filed by Monster Energy Company (“Monster”). VPX’s motion for reconsideration should be granted and its objections should be sustained regarding the Honorable Shashi H. Kewalramani United States Magistrate Judge’s order dated October 16, 2019 (ECF No. 136) (the “Order”). The proper outcome is to deny Monster’s motion to compel VPX’s production relating to VPX’s closely-held proprietary trade secret formula for its BANG® energy drinks – or alternatively the Court should grant VPX’s motion to compel Plaintiff Monster Energy Company’s production of its competing REIGN energy drinks.

### **I. INTRODUCTION**

First, the Court cannot both say Monster’s claims are limited to the quantity of “creatine” in BANG in denying VPX’s motion to compel, and still compel VPX to produce more than the quantity of creatyl-l-leucine. Further, since VPX disclosed the quantity of creatyl-l-leucine and caffeine, the formula is no longer necessary.

Second, as the Protective Order itself makes clear, there is no agreement in place with respect to the protection to Highly-Confidential and trade secret information at trial, including the information which is the subject of this motion for reconsideration: VPX’s formulas. VPX contends that Monster – a notorious

1 trademark bully (*see* cites in ECF No. 131, page 2, footnote 1) – sued VPX for  
2 improper purposes to compete with VPX’s BANG product by introducing  
3 competing REIGN product that is nearly identical. VPX also contends that  
4 Monster sued VPX for anti-competitive reasons, including to try to obtain this  
5 proprietary formula. Now, in its Opposition, Monster is willing to misrepresent the  
6 scope of the protections provided by the Protective Order in order to try to obtain  
7 this proprietary information at trial.  
8  
9

## 10 **II. UNCONTESTED FACTS**

11  
12 Monster does not dispute that it is a competitor of VPX. In fact, because the  
13 parties are competitors, Monster contends that its own formulas would be harmful  
14 if disclosed to VPX.  
15

16 Monster does not dispute that Monster introduced a competitive product,  
17 REIGN, that is similar to BANG both with respect to ingredients and  
18 advertising/labels. Monster acknowledges it is trying to compete with BANG by  
19 introducing this REIGN product, which occurred after the filing of this lawsuit.  
20

21 Monster does not dispute that VPX disclosed the amount of creatyl-l-leucine  
22 (less than 40 mg) and the amount of caffeine (300 mg).  
23

24 Monster does not dispute that its prior counsel in this case was disqualified  
25 or that VPX has valid concerns that this information should not be provided to  
26 competitors.  
27

28 ///

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### III. LEGAL ARGUMENT

#### 1. The Protective Order Does Not Adequately Protect VPX With Respect to Trial or Undisclosed Industry Experts

Despite Monster's argument in its Opposition that the Protective Order would address all of VPX's concerns or "adequately protect" the parties' confidential information (Opposition, ECF No. 147, 2:17-28), the Protective Order says the parties must address issues related to trial with the trial judge:

Any use of Protected Material at trial shall be governed by the orders of the trial judge. This Order does not govern the use of Protected Material at trial.

ECF No. 125, Paragraph 3, 6:7-8. *See also*, Id., Paragraph 12.2, 16:15-16:

12.2 This Order does not govern the treatment of Protected Material at trial, which shall be raised by the parties but separately addressed by the Court.

Thus, Monster's argument that Monster's executive and employees will not have access to the formula is at least misleading, if not entirely false.

VPX raised this concern in its Opposition to Monster's Motion to Compel, as well as in its Objections and Motion for Reconsideration. See ECF No. 132, page 2, *citing Lakeview Pharmacy of Racine, Inc. v. Catamaran Corp.*, 2017 U.S. Dist. LEXIS 163624 (M.D. Pa. Sep. 28, 2017) ("[I]t would be divorced from reality to believe that either party here would serve as the champion of its competitor . . . to maintain the confidentiality designation or to limit public disclosure . . . during trial." (*quoting Micro Motion, Inc. v. Kane Steel Co., Inc.*,

1 894 F.2d 1318, 1325 (Fed. Cir. 1990)). *See also*, ECF No. 140, 11:13-12:5.

2 Monster does not contend that it will keep this information secret at trial.

3  
4 VPX argued that the Protective Order does not protect VPX at trial. ECF  
5 No. 130, 12:13-14 (“The Protective Order is Not Sufficient Protection for a  
6 Competitor Obtaining this Information at Trial.”). Monster’s Opposition glosses  
7 over this fact. Monster’s arguments regarding the scope of the language of the  
8 Protective Order should be disregarded by the presiding Article III Judge. Judge  
9 Kewalramani made a mistake in applying Monster’s misleading facts about the  
10 application of the protective order and misapplied the law. Judge Kewalramani  
11 does not (and cannot) address how the Article III Judge should handle this  
12 information at trial and other open headings. Monster appears to recognize this  
13 fact. ECF No. 147 (“the protective order did not attempt to dictate trial  
14 procedures.”)  
15  
16  
17  
18

19 In addition, VPX raised concerns about undisclosed industry experts who  
20 should not be permitted to see this proprietary formula just because they are  
21 defined as “Experts” under the Protective Order (which currently permits  
22 consultants, independent contractors, and other third parties so long as they are not  
23 likely to be “employees”). ECF No. 125, Paragraph 2.8, 4:23-27.

24 For the foregoing reasons, the Order is clearly erroneous. Further, a  
25 protective order must be in place to protect VPX’s interests in the event that this  
26 information is compelled.  
27  
28

1                   **2. Monster Has Not Shown that the Entire Unredacted Formula for**  
 2                   **BANG is Necessary**

3  
 4           VPX maintains that the formula and quantities of all ingredients are not  
 5 relevant or necessary. Monster states in its Opposition “VPX broadly argued that  
 6 *all* BANG ingredient quantities were irrelevant.” Citing ECF No. 30, page 2. But  
 7  
 8 Monster ignores that VPX was arguing that Monster cannot meet its burden to  
 9 show relevance of this information since **VPX had disclosed the quantity of**  
 10 **caffeine** and Monster makes the same statements on its label regarding what  
 11 ingredients are contained within it:  
 12

13           Monster does not allege that consumers chose BANG® over a Monster  
 14 product because BANG® is advertised as having a certain *quantity* of  
 15 any ingredient or that VPX even advertises certain *quantities* of  
 16 ingredients for which consumers would rely. Monster’s allegations in  
 17 support of those three causes of action are not about the quantities of  
 18 any ingredient in BANG®, including creatyl-L-leucine. *See* FAC,  
 19 Paragraphs 122, 132, 141. The only relevant factual information is 1)  
 20 whether BANG contains creatyl-L-leucine, to which Monster admits  
 21 and its own testing confirms (*See* Exhibit A to the FAC) and 2) whether  
 22 BANG® provides “Fuel” for the body and mind, which is abundantly  
 23 supported by the uncontroverted fact that BANG® contains 300 mg of  
 24 caffeine, as stated on the BANG® label. Similarly, Monster’s knockoff  
 25 Reign energy drink advertises 300 mg of caffeine, BCAA Aminos,  
 26 CoQ10, and B Vitamins, with the copycat tagline “Total Body Fuel”.  
 27 Monster cannot, in good faith, argue to this Court that a certain quantity  
 28 of creatyl-L-leucine must be present to advertise an energy drink as  
 “fuel” given Monster calls its copycat REIGN product “fuel” and it  
 contains no creatyl-L-leucine.

Now, VPX has also disclosed the quantity of creatyl-l-leucine to Monster.

VPX maintains this position with respect to the full, unredacted formula is not

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1 necessary, and Magistrate Judge Kewalramani erred in compelling the formula  
2 without evidence that the entire formula is necessary. Monster does not need the  
3 entire formula, nor all quantities of all ingredients, based on either Monster's  
4 allegations or VPX's defenses.

5  
6 **3. The Court is Permitted to Consider New and Different Material**  
7  
8 **Facts in a Motion for Reconsideration Under Local Rule 7-18.**

9 Monster does not address the Court's ability to reconsider the Magistrate  
10 Judge's decision based on "a material difference in fact," and/or "new material  
11 facts" "occurring after the time of such decision," pursuant to Local Rule 7-18.  
12 While VPX maintains its position that the Magistrate Judge made a factual error,<sup>1</sup>  
13 VPX is also providing the Court with the facts that have since been disclosed  
14 during the Parties' efforts to resolve this dispute while maintaining the secrecy of  
15 the proprietary formula.  
16

17  
18 Monster does not dispute that VPX recently disclosed there are less than 40  
19 mg of creatyl-l-leucine in BANG – nor does Monster dispute that VPX disclosed  
20 that there are 300 mg of caffeine in BANG. Likewise, Monster does not dispute  
21

22  
23  
24 <sup>1</sup> Although the court in *Estate of Gonzales ex rel. Gonzales v. Hickman*, 2007 WL  
25 3231956, at \*2–3 (C.D. Cal. Apr. 18, 2007) held that "[i]n reviewing the  
26 magistrate judge's order for factual error, the district court is limited to the record  
27 that the magistrate judge had before her in the proceeding below," this statement is  
28 based on the premise that the newly presented evidence had existed when the  
Magistrate Judge made the ruling, and the party chose not to submit the then-  
existing evidence. Here, VPX respectfully requests the court to reconsider  
Plaintiff's motion to compel based on the newly disclosed facts in the case.



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1 that there are 300 mg of caffeine in Monster's copycat REIGN product; nor that  
2 Monster designed its REIGN product to mimic BANG's successful product.  
3  
4 Monster does not dispute that the REIGN product essentially copies all the relevant  
5 ingredients of BANG (other than creatyl-l-leucine). And that is why the Court  
6 must consider the formulas for both BANG *and* REIGN in connection with each  
7  
8 other.

9       The formulas relate to the elements of the causes of action that Monster is  
10 asserting – for whether these advertisements/labels are truthful, misleading, or  
11 material. The context of a competitor's nearly identical product and  
12 advertising/labels, namely Monster's REIGN product, is thus necessary for the fact  
13 finder to evaluate Monster's claims against VPX.  
14  
15

16       If Monster feels it is not misleading to advertise the ingredients CoQ10,  
17 BCAAs, and other ingredients on Monster's REIGN product, then how is it  
18 actionable for BANG's can to contain the same ingredients and advertising on its  
19 labels? This goes to the heart of VPX's defense, which was addressed in VPX's  
20 motion for reconsideration – yet (1) was not considered by Magistrate Judge  
21 Kewalramani, (2) was not addressed in the order denying Monster's Motion for a  
22 Preliminary Injunction, and (3) was likewise absent from Monster's Opposition to  
23 this motion for reconsideration. It is not simply the defense of unclean hands that  
24 Magistrate Judge Kewalramani got wrong, it is also the lack of any evaluation of  
25 Monster's own causes of action and what Monster must prove factually in order to  
26  
27  
28



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1 maintain that position. As addressed by VPX, Monster cannot with a straight face  
 2 make these claims against VPX based on VPX's formula and quantities of  
 3 ingredients while disclosing Monster's formula and ingredients. Monster must use  
 4 this argument about whether 40 mg of one ingredient is sufficient as a sword  
 5 against VPX (while 300 mg of caffeine is not sufficient energy), and hide behind a  
 6 shield Monster's own formulas and labeling practices.  
 7  
 8

#### 9 **4. Alternatively, Monster's Formula For REIGN Should Be Compelled**

10 Monster does not dispute or even address the elements of a Lanham Act  
 11 43(a) false advertising claim, tacitly acknowledging that VPX raised issues that  
 12 Monster must prove as elements of a claim in order to prevail. These issues were  
 13 raised in VPX's Motion for Reconsideration. ECF No. 140, 14:5-16:10; *See also*,  
 14 ECF No. 122, page 5.  
 15  
 16

17 VPX argued that when considering the relevance and necessity of the  
 18 information in REIGN's formula, the Court must evaluate all the other elements  
 19 when determining that Monster's formula is relevant (i.e., REIGN's knockoff  
 20 formula is just as relevant to consumer expectations, reasonable reliance on  
 21 reference to ingredients on labels (versus what is in the formula), Monster's claim  
 22 that it is damaged by VPX's advertising, and VPX's unclean hands defense.  
 23  
 24

25 Monster addressed only unclean hands, and the cases Monster cited were  
 26 inapposite. *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837 (9th Cir.  
 27 1987) is distinguishable because VPX is not trying to establish the unclean hand  
 28

1 defense just by claiming Plaintiff's advertisement and label is deceptive and  
2 misleading. Defendant's unclean hands defense is also based on the fact that  
3 Plaintiff launched a nearly identical product to directly competes with VPX's  
4 BANG product, and the purpose of this lawsuit and compelling the full formula of  
5 VPX's product is to gain unfair competition advantage in the market.  
6

7  
8 *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, 258 F.R.D. 663 (W.D. Wash.  
9 2009) is likewise distinguishable because VPX's unclean hands defense is not  
10 based on misconduct in the abstract or based solely on mere allegations that  
11 Plaintiff falsely advertised its product. Again, VPX needs this information to show  
12 Monster is using this lawsuit as a weapon to gain unfair competition advantages to  
13 show both that Monster has unclean hands, that Monster is not damaged by the  
14 alleged statements, and that this case is exceptional.  
15

## 16 17 **5. CONCLUSION**

18 For the reasons set forth above and in the remainder of the record before the  
19 Court, VPX seeks an order denying Monster's motion to compel further responses  
20 to Interrogatory No. 1 regarding the formula for BANG. In the alternative, VPX  
21 seeks an order compelling production of the REIGN formula so VPX can evaluate  
22 Monster's proof with respect to each element of its claims and to evaluate all  
23 defenses available to it with respect to Monster's allegations including unclean  
24 hands.  
25  
26  
27

28 ///

1  
2  
3 Dated: November 25, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, 275 Battery Street, Suite 2000, San Francisco, CA 94111, my electronic mail address is [mkanach@grsm.com](mailto:mkanach@grsm.com). On November 25, 2019, I served the foregoing document(s) entitled: **DEFENDANT VITAL**

**PHARMACEUTICAL, INC.'S OBJECTIONS AND MOTION FOR RECONSIDERATION OF MAGISTRATE JUDGE ORDER RE MOTIONS TO COMPEL (ECF NO. 136)** as follows:

- ☒ **BY ELECTRONIC SERVICE THROUGH THE CM/ECF SYSTEM** which automatically generates a Notice of Electronic Filing at the time said document is filed to all CM/ECF Users who have appeared in this case. Service with this NEF constitutes service pursuant to FRCP 5(b)(E).

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction this service was made.

Executed on November 25, 2019 at San Mateo, California.

*/s/ Michael D. Kanach*

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